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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

v.

THE DARLINGTON, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF FOR THE APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF FOR THE APPELLEE

Questions Presented

The issue in this case is simply whether the Appellant, Federal Housing Administration, upon complaint by a hotel, may use the prohibitive terms of Section 513 of the Housing Act of 1954, prepared, introduced and passed by Congress at the direct persuasion of the American Hotel Association, to prevent competition with the members of

that Association, to deprive the Appellee of its right to rent for terms of less than thirty days, a mere ten per cent or less of the otherwise unrentable apartments in its twelve story apartment building in Charleston, S. C., consisting of 156 apartments, the mortgage over which was insured by the Appellant under the 1946 Housing Act known as the Veterans Emergency Housing Act, when Appellee does not advertise or hold out to the public in any manner whatsoever that transient accommodations are available in the building, does not furnish bell boy service or room service, and has no dining rooms, convention rooms or other similar space usually found in a hotel, and when it is uncontradicted that without the rent from such apartments the Appellee would be unable to make the payments called for by the mortgage insured by the Appellant, and the Appellee would be faced with certain bankruptcy, the Appellant would have to foreclose on the mortgage, suffer a substantial loss on its insurance contract, with resulting loss to the taxpayers of the United States, and with the prospect that when Appellant disposed of the building it would be turned into a hotel subsidized by the taxpayers to the extent of the amount which Appellant will have lost on the sale (R. 114).

There are in Appellee's opinion four principal questions presented by this appeal. We feel a fair statement of such questions is as follows:

First Question

Was there any provision in Section 608 of the National Housing Act, as amended by the Veterans Emergency Housing Act of 1946, or in any regulation issued thereunder in existence when Appellant insured the mortgage over Appellee's apartment project, or in the Appellee's charter, prohibiting the rental of an apartment unit in Appellee's project for a term of less than thirty days?

Second Question

Does Section 513 of the Housing Act of 1954 have such retroactive effect in law as to empower the Federal Housing Administration to deprive the Appellee of its right to rent less than a mere ten per cent of the apartments in its building for a period of less than thirty days?

Third Question

Does Section 513 of the Housing Act of 1954 except from its provisions such projects as Appellee's, operated as it is, which were insured by the Appellant prior to the effective date of the said Act?

Fourth Question

Does Section 513 of the Housing Act of 1954 serve any valid public purpose?

Statement

The issue in this case is not whether the Appellee has a right to operate its building as a hotel, as Appellant alleges in its Brief, but whether the Federal Housing Administration, an agency of the government created for the purpose of insuring mortgage loans, can retroactively apply the prohibitive terms against transient rentals found in the new Housing Act of 1954[1] to deprive the owner of an apartment house (the mortgage over which was insured on December 30, 1949, many years prior thereto

[1] When requested by the Appellee to advise by what authority the Appellant claimed the power to deprive the Appellee of its rights to rent some of its apartments in its building for less than thirty days, the Deputy Assistant Commissioner of the Appellant replied, "You may not have heretofore been made aware of a section of the Housing Act of 1954 which prohibits the use of such government assisted projects for transient purposes. We are, therefore, quoting a portion of the new law". (Exhibit "C" to Amended Complaint; R. 19).

under the terms of the Veterans Emergency Housing Act of 1946), of its right (R. 113) to rent for periods of less than thirty days a mere ten per cent or less of the apartments in its building (R. 113)—or, as the Three-Judge Court stated:

> "All that is involved here is the right of the mortgagor (Appellee) to lease apartments, *otherwise unrentable*, for periods of less than 30 days." (R. 129; emphasis added.)

A reading of the Veterans Emergency Housing Act of 1946 (Section 608 National Housing Act) under which the Appellee's note and mortgage were insured, will show that it contained no provision whatsoever prohibiting the rental of apartments in projects insured under such act for less than thirty days, as stated by the Court below, the Appellant concedes and admits (R. 107):

> "It is conceded by F. H. A. that, as of December 30, 1949 no specific provision of the charter, by-laws, mortgage, mortgage note, or any rule or regulation of F. H. A. restricted the right of plaintiff to lease apartments in its project for periods of less than thirty (30) days."

The Appellant declares, however, that regardless of the fact that the law, the rules and regulations, by-laws, mortgage, mortgage note and charter provisions did not contain any specific prohibition against rentals in the Appellee's project for less than thirty days, that it is the history of the Act which prohibits transient rentals in the Appellee's project.[2]

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[2] In answer to the Court's inquiry as to whether there was any prohibition in the Act against transient rentals, Mr. Eardley, Trial Counsel for the Appellant, stated, "There was no language that said, 'You cannot rent to transients', if that is what you mean. I think the history of the Act makes it just as expressly clear." (R. 101)

It is not contested that without the revenue from the rental of the apartments in the Appellee's building for less than thirty days, the Appellee will lose its investment in the building, running into hundreds of thousands of dollars, and the Appellee will not be able to make the payments called for on the mortgage, and will be faced with bankruptcy, or as the Court below stated (R. 102-103):

> "This is not a matter involving so-called windfall profits which became so prevalent under loose and questionable practices in the years following the termination of World War II. Plaintiff's sponsors caused land, valued at $125,000.00 to become a part of the project. It has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11. F.H.A. insured a mortgage to the extent of $1,357,700.00, thus leaving an investment of $318,220.11 on the part of plaintiff."

In addition to the initial investment of the sum of $318,220.11 in the construction costs in the building as above set forth, it is uncontested that at the time of the commencement of this action, the Appellee had made monthly payments called for by the mortgage totalling $305,957.25 (Amended Complaint; R. 5). And the Court below stated (R. 114):

> "The unusual situation created by reason of F.H.A.'s insistence to cease the practice of renting apartments for periods of less than thirty (30) days will admittedly necessitate the financial downfall of Darlington, with the resultant loss of an initial investment, together with the monthly payments of $6222.79 each, beginning June 1, 1951, as well as a reserve

account, etc. It certainly would not justify the continued existence of Darlington and bankruptcy would be the ultimate answer. A foreclosure of the mortgage would follow with the Commissioner of F.H.A. acquiring title as it is fair assumption that no purchaser at said sale would bid an amount equal to, or in excess of, the unpaid balance due on said mortgage. The mortgagee is obligated to acquire title under such circumstances and assign that title to the Commissioner who, in turn, sells the property without regard to any limitations as to use, etc., unless, of course, F.H.A. insures a new mortgage on the project. The result is that a foreclosure is likely to bring about a hotel with its right to advertise and operate as such—the mortgagor would lose its investment—F.H.A. would undoubtedly be called upon to pay a substantial sum by reason of its insurance obligation to the mortgagee—and no one would profit."

The Appellant contends that although it is the insurer of the mortgages, it is not concerned with whether the rental of some apartments in a project for less than thirty days is necessary in order for the owner of the rental project to meet the payment called for by the mortgage.[3] Reference to Section 10(f)2 of the Veterans Emergency Housing Act of 1946 (60 Stat. 214) will show that it amended Section 608(b) of the National Housing Act by striking out subsection (2) thereof, which had required that projects insured under former Section 608 be "designed for

[3] "Mr. Long: Next is the affidavit of Mr. Steadman which shows the operating loss of the Darlington Apartments. • • •.

"Mr. Eardley: We object to the affidavit on the ground that even if the facts alleged in here are true, it wouldn't be material to the issues in this case, which is simply to determine whether or not under the law they are entitled to rent to transients. The law doesn't say that if you make a loss you are entitled to rent transients." (R. 46-47.)

rent for *residential* use * * *" (Emphasis added) and inserted in lieu thereof a new and essentially different subsection (2) which did not contain any provision that the projects insured thereunder had to be designed for residential use. Subsection (2) of the new Section 608 of the National Housing Act, under the terms of which the Appellee's project was insured, reads as follows (60 Stat. 214; 12 USC 1743 (b)(2)):

> "(2) Preference or priority of opportunity in the *occupancy* of the mortgaged property for veterans of World War II and their immediate families, and for hardship cases as defined by the Administrator, shall be provided under such regulations and procedures as may be prescribed by the Administrator." (Emphasis added.)

The record in this case is conclusive, and Appellant has conceded that "no person entitled to priority has ever been rejected, and no one desiring so-called 'permanent'-occupancy of an apartment has been required to wait any time to obtain same." (R. 112).

A. Facts Underlying This Litigation

Following the passage of the Housing Act of 1954, by letter dated January 4, 1955, the Appellant, through its South Carolina State Director, demanded of the Appellee, The Darlington, Inc., that it cease immediately the offering and renting of accommodations in its apartment building on a transient basis (Exhibit "A" to Amended Complaint; R. 16-17). The said letter did not disclose any authority as the basis for such demands. The Appellee in reply, by letter dated January 10, 1955 (Exhibit "B" to Amended Complaint; R. 17-19) made a fair disclosure of its operations, admitting the rental of some of its apartments for

less than thirty days, and in the said letter stated and requested as follows:

> " • • • it is the desire of this company to cooperate with your Administration in every reasonable manner, and certainly we have no desire to avoid any responsibility that may be imposed upon our company by the charter of the corporation, and we are sure your administration does not desire to impose any restrictions on our company on the operation of the building that is not called for by the provisions of the charter." (R. 17.)
>
> • • • • • • •
>
> "We, therefore, would greatly appreciate if you would advise us what provisions of law or what provisions of our charter prohibits the renting of apartments for a period of less than thirty days." (R. 18.)

On January 18, 1955 (Exhibit "C" to Amended Complaint; R. 19-21) Mr. LeGrand W. Perce, Deputy Assistant Commissioner (a former Chief Counsel of its Rental Housing Division; Pl. Ex. 28; R. 44, 217), replying to the Appellee's letter of January 10, 1955, directed Appellee's attention exclusively to a new law, the Housing Act of 1954, with no suggestion whatsoever that rentals for periods of less than thirty days had ever been previously prohibited or even frowned upon. His exact language was as follows:

> "You may not have heretofore been made aware of a section of the Housing Act of 1954 which prohibits the use of such government assisted projects for transient purposes. We are, therefore, quoting a portion of the *new law.*" (R. 19; emphasis added.)

The Deputy Assistant Commissioner served notice in his letter that unless the Appellee immediately ceased rent-

ing apartments in its building for less than thirty days, the Appellant would request the Department of Justice to bring action against Appellee to stop such rentals.

B. Proceedings in the Court Below

Based upon the threat of the Appellant as set forth in the exchange of letters above referred to, the Appellee brought this action for a declaratory judgment in the Court below, simply praying judgment as follows (Amended Complaint; R. 15):

> "1. That the Court enter a Declaratory judgment construing and determining the relations and respective rights of the plaintiff and defendant.
>
> "2. That the Court determine that the plaintiff corporation has the right to rent available vacant units in its building to tenants for terms of less than thirty days so long as it complies with the terms of the Housing Act in existence at the time of its incorporation, construction of its said building and insurance of the mortgage on the building by the defendant, and maintains and keeps rental units available for occupancy by tenants for terms or more than thirty days and maintains and operates its building principally for residential use."

The Court below has twice ruled in favor of the Appellee's right to rent a reasonable number of apartments in its building for less than thirty days, 142 F. Supp. 341 (R. 101-121); 154 F. Supp. 411 (R. 127-130). This appeal is from the Order and Decree of the Three-Judge District Court of September 4, 1957, the first paragraph reading as follows (R. 130):

> "(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in

Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided that any veteran of World War II, his immediate family, or any other proper person desiring occupancy for a period of thirty days or more is not thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered."

C. Facts Not In Issue

Appellant has, in this litigation, consistently attempted to cast this case in the light of a controversy as to whether Appellee may operate its project as a hotel, and we feel that the record should be kept clear, that the Appellee does not and never has operated its apartment project as a hotel. In the unchallenged finding of the Court below, Appellee "does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients." (R. 113.)

This litigation does not involve in any manner or means a desire on the part of the Appellee to operate its project as a hotel, but merely to utilize available vacant and otherwise unrentable apartments in it for terms of less than thirty days, only as necessary to supplement its revenues and enable it to meet its mortgage payments. This is best evidenced by the relief prayed for in the Complaint heretofore referred to (R. 15, supra, 9).

The plans of the building (Plaintiff's Exhibit 5, R. 40) filed with this Court, will show that the building contains

no public rooms or similar facilities usually found in hotels. The record in this case will show that Appellee's building contains no single rooms such as are suitable for hotel operation, but contains apartment units of from two to six rooms each (Pl. Ex. 24-A; R. 43, 194).

The Court below found that the number of rentals for less than thirty days for Appellee's building was "approximately ten per centum of the entire available occupancy" (R. 113). It is thus obvious that this case does not involve the issue of Appellee operating a project insured under the Veterans Emergency Housing Act for hotel purposes, even in part, for as stated by the Court below, "But the mere acceptance of transients as tenants does not, in and of itself, convert a rental housing project into a hotel." (R. 113).

D. Historical Background Of The Veterans Emergency Housing Act

With the return to civilian life of millions of veterans of World War II, there developed the greatest housing shortage ever known to this country. The need was not for hundreds of thousands of living accommodations but for millions (100 Cong. Rec. 11879; Pl. Ex. 30; R. 44, 222). Congress was called upon to provide housing for the veterans. To meet the unprecedented situation Congress considered—but rejected—a mere amendment to the housing act. Instead, it enacted the temporary Veterans Emergency Housing Act of 1946 as independent legislation, wholly outside the framework of the National Housing Act, to provide temporary accommodations to meet the temporary emergency needs of the returning veterans. This is the Act which is before this Court for construction in this case.

The Report of the Senate Committee on Banking and Currency on the Veterans Emergency Housing Act of 1946

(S. Rept. 1130, 79th Cong., 2d Sess.) was submitted by Senator Barkley. That report stated (pp. 9, 10):

> "TEMPORARY CHARACTER OF THE BILL
>
> "The Committee fully recognizes that the unusual powers and provisions contained in the bill should not be of permanent duration. The emergency begets the need, and the need should disappear when the emergency is over." (p. 9) • • •
>
> "While the bill as passed by the House of Representatives amended the National Housing Act, the committee has felt it more appropriate that the bill be cast in the form of an independent Veterans' Emergency Housing Act of 1946, *since the features of the bill are temporary and bear little relationship to the National Housing Act which deals with certain permanent housing legislation.*" (p. 10; emphasis added.)

This statement is in sharp contrast with the repeated assertions in Appellant's Brief that Section 608 contemplated "permanent residential housing". As further evidence of the temporary character of the bill, the Appellant, the Federal Housing Administration, declared in January 1947 (Pl. Ex. 8; R. 41, 135, 147):

> "The Veteran needs—and wants apartments." • • •
>
> "Veterans are not prepared today to undertake home purchases for the majority cannot afford to build or buy on today's market. Most of them are young. Some are still in school and others are in job training and have not established themselves financially. Their ultimate earning levels are not yet determined. Furthermore many of them have not yet selected the community in which they will settle permanently."

The need was for temporary housing to serve the temporary need of the veterans, many of whom, according to the Appellant's witness, Mr. Prothro, were living in so-called chicken coops and doubling up with their in-laws (R. 100).

Senator Sparkman, speaking in 1954 of the need for the former Veterans Emergency Housing Act of 1946, stated (100 Cong. Rec. 11879; Pl. Ex. 30; R. 44, 222).

What made the postwar section 608 program necessary?

> "Let us take a look back in history. When the war ended there were millions of veterans searching for a place to live, any place that would enable them and their families to enjoy *decent shelter* while they went about the business of becoming again a normal part of the civilian community." (emphasis added.)

If there is any question that the Veterans Emergency Housing Act was intended to provide temporary rental housing for veterans during the housing crisis that followed World War II, rather than permanent family dwellings as asserted by the Appellant, we invite attention to the report of the Committee on Banking and Currency (S. Rept. 1130, 79th Cong., 2d Sess.) where the Committee, in reporting the bill to the United States Senate, stated:

> "• • • The committee calls special attention to the fact that this portion of the bill places emphasis upon rental housing. It is the specific intent of the committee that those in charge of the program shall make every reasonable effort to obtain a substantial volume of rental housing—*or in any event housing held for rental during the emergency*—through the operation of title VI, both with respect to multi-family units and individual units. While home ownership is to be encouraged, a large percentage of veterans do not yet possess the certainty

> of income *or of location*, or the financial means, to purchase homes at this time. The bill as approved by the House of Representatives included this attention to rental housing." (pp. 8-9; emphasis added.)

Any contention that the Veterans Emergency Housing Act was to provide permanent residential dwelling accommodations is simply not sustained by the facts, the need that brought the Act into existence, the legislative history of the Act, or the wording of the Act itself.

It will be noted by reference to all other provisions of the National Housing Act, that Section 608 as amended by the Veterans Emergency Housing Act of 1946 was at the time of its enactment the only act ever incorporated as a part of the National Housing Act, designated as an emergency housing measure.

It will be further noted by reference to the Veterans Emergency Housing Act, and all other provisions of the National Housing Act, that it was at the time of its enactment the only part of the National Housing Act that did not provide as a part of the wording of the statute itself that any project insured under the terms of the act should be designed principally for residential use. The Court below stated (R. 128):

> "When Congress passed the Housing Act of 1954 declaring its intent 'since the enactment of the National Housing Act' to the effect that housing built with the aid of mortgages insured under the former Act was to be used 'principally for residential use', it injected the last quoted words into the Act relating to '608 projects' for the first time. True, similar language had been used in related provisions of the National Housing Act, but the amplification of this 'intent' to exclude the use of such housing for transient or hotel purposes

while the insurance on the mortgage was outstanding makes its first appearance in the Act of 1954."

The Senate Committee Report in connection with the Veterans Emergency Housing Act of 1946 will show that Congress in the enactment of the Act, being desirous of meeting the housing crisis with all due speed, directed the Federal Housing Administration to use every effort to promote the necessary housing under the said Act. The Committee, in its report (S. Rept. 1130, 79th Cong. 2d Sess.) stated as follows:

> "Paragraph (c) directs Government agencies to exercise their emergency and other powers to aid in the solution of problems created by the existing housing emergency." (p. 10)

The Veterans Emergency Housing Act of 1946, 60 Stat. 207, 208, reads as follows:

> Sec. 1.(a) "The long-term housing shortage and the war have combined to create an unprecedented emergency shortage of housing, particularly for veterans of World War II and their families. * * *"
>
> Sec. 2.(c) "The executive agencies of the Government shall exercise their emergency powers and other powers for the purpose of aiding in the solution of the problems created by the existing housing emergency, the alleviation of which is vital to an orderly transition from war to peace."

The President of the United States stated in December 1946 in reference to the Veterans Emergency Housing Program:

> "I am determined that a vigorous housing program will continue to be carried out in 1947. * * *. The main

> point of emphasis for 1947 is rental housing * * *. More family units must be made available for rent to veterans. They should not be compelled to buy in order to get shelter. * * * The great bulk of this task will fall upon private enterprise." (Pl. Ex. 8; R. 41, 135, 172; Pl. Ex. 9; R, 41, 178)

Pursuant to the mandate of the Veterans Emergency Housing Act, the Appellant exercised to the fullest its emergency and other powers in the solution of the housing emergency, putting into effect one of the greatest promotional campaigns that could possibly be conceived of, designed to induce private industry to engaged in the production of temporary rental units for veterans. Fifty pages of exhibits in this case (Pl. Ex. 8; R, 41, 134-177; Pl. Ex. 9; R, 41, 178-184) contain certified copies of some of the Appellant's voluminous promotional press releases, speeches prepared by the Washington office for the State Directors, instructions and directives, sales talks and programs for the meetings to be held throughout the country, all designed and intended to induce the builders of the country to engage in the construction of Veterans Emergency Rental Housing projects.

The Federal Housing Administration forwarded to the Chambers of Commerce and other appropriate groups in all cities in America with 5,000 population or more publicity material with requests that Appellant's State Directors be furnished with the names of builders and architects in the community (Pl. Ex. 8; R, 41, 140). In all cities in America having a population of 10,000 or more, Appellant's State Directors were instructed to arrange meetings with architects, builders, realtors and lenders, and representatives of the Washington office of the Federal Housing Administration were to appear at said meetings and

deliver addresses, all for the promotion of the construction of Veterans Emergency Rental Housing projects (Pl. Ex. 8; R, 41, 152).

Appellant represented that Veterans Emergency Rental Housing projects would give the mortgagors sound investments that would yield substantial returns (Pl. Ex. 8; R, 41, 147). Yet the Appellant recognized that the projects were being built to serve a particular temporary emergency and asserted that:

> "c. Action has been taken * * * * and provisions made for the *adjustment of mortgage terms,* where it is deemed necessary in order that rental projects, constructed under the present emergency, may continue to maintain their competitive market position". (Pl. Ex. 8; R, 41, 137-138; emphasis in original).

As further evidence that Appellant recognized that housing built under Section 608 was to serve a temporary need we quote from a letter of January 2, 1947, signed by Raymond M. Foley, Appellant's then Commissioner (Pl. Ex. 9; R. 41, 180):

> "*Adjustment of Section 608 Mortgage Terms*
>
> "So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the Federal Housing Administration will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necesary."

The President of the United States, in his public statement of December 14, 1946, expressed the same thought in these terms (Pl. Ex. 8; R, 41, 176):

"Assistance for Rental Projects"

• • •

"To guard against the possibility of lesser earnings of housing projects after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subsequent periods in the life of the project."

No where in the voluminous mass of its promotional material did the Appellant so much as intimate or suggest, directly or indirectly, that there was or would ever be any limitation on the minimum rental terms of apartments in such projects.

There can be no doubt that the Federal Housing Administration, pursuant to the mandate of the Veterans Emergency Housing Act, did an outstanding promotional job, promoting private industry to create the temporary rental housing needed by the returning veterans of World War II. We quote from an address by Senator Sparkman in 1954 (100 Cong. Rec. 11,882-11,883; Pl. Ex. 30; R. 44, 225):

"• • • The 608 program broke the back of the postwar rental housing shortage. It provided good rental housing quickly to meet the needs of our returning veterans. • • • It was undoubtedly one of the most successful of all Government housing programs. • • •

"Mr. President, these are matters of history—of indisputed, incontrovertible fact. Here we have a program designed to aid the veteran to get rental housing, • • • which provided the housing at a time when no other device could have succeeded, *and which did it without using 1 cent of Government money.*" (Emphasis added.)

Samuel E. Neel, General Counsel, Mortgage Bankers Association of America, in testifying before the Senate Committee in connection with the Housing Act of 1954, stated in connection with the 608 program as follows (Senate Hearings, Part 3, p. 1512; Pl. Ex. 28; R. 44, 208-209):

> "* * * At the time this program was enacted, Congress went out of its way to note that the country was desperately in need of rental housing. The program was intentionally made liberal in order to encourage builders to build these projects. With this congressional mandate the FHA undertook an intensive promotional campaign. * * *
> * * * *
> "* * * There is no question but that the FHA all over the United States encouraged builders to go into this program. They made sales talks. It was just like a bond rally. They were trying to get houses built and they were trying to get builders in the program."

Walter L. Green, Deputy Commissioner, retired, of the Federal Housing Administration, who was a former Commissioner of the Administration, when called before the Senate Committee on Banking and Currency to advise the Committee in 1954 in connection with its housing problem (R. 211) stated in reply to a question by the Committee Chairman in reference to the Veterans Emergency Housing Program (Senate Hearings Part 3, p. 1670; Pl. Ex. 28; R. 44, 212):

> "Senator, as a matter of record, there is no question but what we promoted it and promoted it hard, all over the country, in order to get builders to go into this operation."

There is no suggestion, reference or intimation to be found anywhere in the fifty pages of promotional material designed to induce the citizens of this country to construct Veterans Emergency Rental Housing projects set forth in the record of this case (Pl. Ex. 8; R. 41, 134-177; Pl. Ex. 9; R. 41, 178-184), that the Appellant ever intended that apartments in such projects could not be rented for less than thirty days. The facts surrounding the promotion of the construction of the Veterans Emergency Rental Housing projects, we submit, are repugnant to and contradict Appellant's present assertion that it has always been its intention that apartments in projects insured under the Veterans Emergency Housing Act could not be rented for less than thirty days.

It would be contrary to fair play and fair dealing and beneath the dignity of an agency of this Government for Appellant to have concealed from those whom it was promoting into the construction of Veteran Emergency Rental Housing projects that apartments in such projects could not be rented for less than thirty days, and that Appellant would attempt to enforce such prohibition in situations like those presented in the instant case, where enforcement will mean certain bankruptcy. We cannot but believe that if at the time the Appellant was promoting the Veterans Emergency Housing Program it had believed that apartments in such projects could not be rented for less than thirty days, Appellant would have so indicated to the American public somewhere in its voluminous promotional data and publications.

The Federal Housing Administration was seeking housing accommodations for veterans, whether for one day, one week, or for three years. As the Court below stated (R. 116):

"In truth and in fact, the question now under consideration was never given a thought. In the desire of Congress to fulfill the need for housing, only such matters as the needs of war workers, veterans, families of veterans, and the customary soundness of the transaction from a financial standpoint with its attendant restrictions were the subject of legislation and intention."

Summary of Argument

The issue in this case is simply whether the Appellant can retroactively apply the prohibitive terms and provisions against operations for hotel and transient purposes found in Section 513 of the Housing Act of 1954 so as to prohibit the Appellee, the owner of a 12-story 156-unit apartment building in Charleston, S. C., from renting a few of the apartments in the building for less than thirty days, when there was no prohibition to be found against such rentals under the terms of Section 608 of the National Housing Act, as amended by the Veterans Emergency Housing Act of 1946, under which the mortgage over the Appellee's project was insured on December 30, 1949.

This case, unlike the facts in the case of *Mason* v. *Rock Creek Plaza, Inc.*, (D.D.C. 1958) cited by the Appellant in its Brief at page 39, does not involve the issue of whether the Appellee may or may not operate its building as a hotel, which is substantially all that is prohibited by Section 513. And again unlike the facts in *Mason* v. *Rock Creek Plaza, Inc.*, this case does not involve repeated and continuous violation of a written agreement with the Federal Housing Administration. In that case the mortgagor through written contract with the Appellant, offered accommodations to 600 transient guests at a time. It advertised as a hotel, furnished room and bell boy services. In this case by

contrast during the month of the greatest demand for transient rentals in Charleston, Appellee has rented on an average less than 10% of its apartments for terms of less than thirty days (R. 113).

It is further undisputed that the Appellee has never advertised as a hotel, nor does it offer room and bell boy services, but simply has rented apartments for less than thirty days when there was no demand otherwise and rather than to leave the apartments vacant and unproductive of any revenue at all.

The Court below, as the Complaint will show, was simply asked to declare that the Appellee had the right to continue to rent available vacant units for periods of less than thirty days, when there was no demand for such apartments by veterans of World War II, who were entitled to priority of occupancy, or when there was no demand for the apartments by anyone for rentals of more than thirty days. The record shows that the rental of apartments for less than thirty days was a mere incidental activity of the Appellee in the operation of its building, trying to secure revenue with which to make the payments called for by the mortgage insured by the Appellant, and in an effort to protect the Appellee's investment in its building running into some four hundred thousand dollars.

We will not in our argument comment on the affidavit of Mr. Norman P. Mason, the present Commissioner of the Federal Housing Administration (R. 35) which the Appellant attempts to use (Appellant's Brief page 33 n. 34) as authority for its contention that the term "principally designed for residential use" as found in the Act excludes the rental of any apartments in any multifamily housing project for less than thirty days. The affidavit of Mr. Mason shows that his allegations are based upon information and belief, and rightly so, because as shown from the hearings before the Banking and Currency Committee of

the Senate in 1954 (Senate Hearings Part 1, p. 243; Pl. Ex. 27) Mr. Mason first appeared before the Committee in connection with the Housing Act of 1954 as a representative of the Chamber of Commerce being appointed Commissioner shortly thereafter.

Further, his affidavit refers to the interpretation placed on the words "principally designed for residential use" as found in the Act. There is no such wording in Section 608 of the Act. Further, we maintain and will show that the word "principally" can never be distorted into meaning "exclusively", as the Appellant urges.

The Appellee maintains:

First: That contrary to the implications set out in the Appellant's Brief, this case does not involve the issue of the Appellee attempting to operate its building for hotel purposes. As the lower Court stated, the Appellee does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients. As the plans of the building, which are in evidence, (Pl. Ex. 5) will show, the building has no public space such as dining, meeting or convention rooms, or the like, usually found in hotels, and no food, beverages, or bell-boy service is furnished to any tenant in the building.

Second: We take it to be admitted, it certainly is not contested, that all rights between the Appellee and the Appellant, whether involving transient rentals or otherwise, are to be determined as of the date the Appellee's note was endorsed for insurance by Appellant. The rule of the Appellant so states (24 CFR 282.19):

> "*Amendments to Regulations.* The regulations in this part may be amended by the Commissioner at any time and from time to time, in whole or in part, *but such amendment shall not affect the contract of insurance*

on any mortgage already insured or any mortgage or prospective mortgages on which the Commissioner has made a commitment to insure." (Emphasis added.)

The endorsement on the note secured by the mortgage over Appellee's project reads as follows (R. 106-107):

"Insured under section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949.

To the extent of advances approved by the Commissioner.

Federal Housing Commissioner
By H. E. Bailey
Authorized Agent

Date, December 30, 1949."

Third: The Appellant concedes that there was nothing in the wording of the law, the rules and regulations, or the Appellee's charter, or in any contract documents between the parties, as of the date the Appellee's mortgage was insured, that directly or specifically prohibited rentals of apartments in Appellee's project for less than thirty days.

Fourth: The Appellant further concedes that the Appellant's right to interfere with, control or regulate the operations of the Appellee's project was dependent upon the rights given the Appellant as the sole preferred stockholder in Appellee's corporation. Appellant's Brief at page 5 reads as follows:

"In order to regulate the mortgagor, the Commissioner was to receive 'certain shares of (the mortgagor's) special stock' which would confer majority voting rights in the event of default under the mortgage, charter or any other agreement between the mortgagor and the Commissioner."

There is no question in this case of any default under the mortgage or the violation of any agreement. It is only necessary, therefore, to determine whether the Appellee has violated any of the provisions of the charter.

Fifth: Examination of the charter will disclose that the rental of apartments in the Appellee's building for less than thirty days was not designated as a default under the charter. It is uncontradicted that Appellant prepared and supplied the charter and required Appellee to use it. Reference to the charter will show that the Appellant in preparing the charter and in determining the type and kind of control it desired to exercise over Appellee's project, gave consideration to the term of rental of apartments in Appellee's building and elected to limit the maximum but not the minimum term of rental in the building by the use of the provision: "Dwelling accommodations of the corporation shall not be rented for a period in excess of three years."

Sixth: We maintain that there is no ambiguity in the terms of the charter and that this Court should construe the rights of the parties in accordance with the wording of the charter, which not only does not prohibit rentals of apartments in Appellee's building for less than thirty days, but in fact implies the right of such rentals. However, if it is felt that there is some ambiguity in the wording of Appellee's charter, we maintain that any such ambiguity should be resolved against Appellant both because Appellant wrote the charter and because Appellant has consistently construed such charters as permitting transient rentals. We furthermore maintain that the construction that the Appellant (being the administrative agency charged with the enforcement of the Act) has consistently placed on such charters prior to the Housing Act of 1954 should have great weight with the Court.

Seventh: We will show that the Hotel Association, in persuading Congress to pass Section 513 of the Housing Act of 1954 prohibiting "operation for hotel or transient purposes" in FHA-insured projects, stated as the necessity for the Act that the officials of the Federal Housing Administration had consistently interpreted the provisions of Section 608 as permitting transient rentals or rentals for less than thirty days. We will further show as disclosed by the record that when the Appellee in this case asked the Appellant by what authority it sought early in 1955 to prohibit the rental of some of the apartments in Appellee's project for less than thirty days, that the Appellee was advised by the Deputy Assistant Commissioner (Multifamily Housing), formerly Chief Counsel of the Rental Housing Division, that a *new* law, the Housing Act of 1954, prohibited rentals for less than thirty days.

Eighth: We maintain and urge that if Section 513 of the Housing Act of 1954 is so construed as to make its prohibition of "operation for hotel and transient purposes" apply retroactively to Appellee's incidental rentals for less than thirty days, such construction and application would amount to an unconstitutional retroactive application of the Act, depriving Appellee of its vested rights and taking the property of Appellee without due process of law.

Ninth: We will show that a careful reading of the 1954 Act will disclose that Congress appreciated that it could not pass a law that would retroactively deprive a citizen of vested rights and that the wording of the Act in fact exempts and excludes from its provisions projects such as the Appellee's, insured prior to the enacting date of the said Act.

Tenth: We will show that Section 513 of the Housing Act of 1954 was conceived, promoted, designed and intended to serve only a selfish private interest, and that the Act

serves no public purpose whatsoever, and if enforced will produce results contrary to the public interest, bring about mortgage foreclosures, loss by the Federal Housing Administration of insurance reserves, all to the detriment of the public interest and loss to the taxpayers of this country.

ARGUMENT

I. There is nothing in Section 608 of the National Housing Act, in any pertinent regulation thereunder in effect on December 30, 1949, or in appellee's charter directly or indirectly prohibiting rentals of apartments in appellee's apartment project for terms of less than thirty days.

We join with the Appellant in its statement found on page 19 of its Brief that underlying the holding of the Court below was the premise that prior to the Housing Act of 1954 the Appellee had the right to rent apartments in its building for periods of less than thirty days. As previously stated in this Brief, the Appellant has conceded that at the time of the insurance of Appellee's note and mortgage, December 30, 1949, there was no provision in law, the rules and regulations of the FHA, in the charter or by-laws of Appellee corporation or the note and mortgage insured by the Appellant, prohibiting the rental of apartments in Appellee's project for periods of less than thirty days, but Appellant has tried hard to extract such a prohibition from the legislative history. The short answer is that:

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco* v. *Walling*, 324 U.S. 244, 260; quoted in *Ex Parte Collett*, 337 U.S. 55, 61.

We ask the Court throughout in determining the rights of the parties, to keep in mind the following salient facts which will hereafter be referred to in more detail:

That the Federal Housing Administration is an agency of the Federal Government created by Act of Congress for the purpose of engaging in the business of insuring real estate mortgages; with authority to sue and be sued in any court of competent jurisdiction in like manner and extent as a private corporation and that its regulations and contracts are to be strictly construed against it. *Federal Housing Administration* v. *Burr*, 309 U.S. 242; *Cole* v. *Young*, 351 U.S. 536; *Garrison* v. *United States*, 7 Wall. 688, 690; see also *Ferguson* v. *Union National Bank*, 4 Cir., 126 F. 2d 753.

A. The Federal Housing Administration in Its Control Over the Plaintiff Corporation Is Limited to Such Rights as It Had Under the National Housing Act, the Rules and Regulations of the Commissioner and Any Contracts Between the Parties as Were in Effect on December 30, 1949.

We submit that the Federal Housing Administration, Appellant herein, recognized that in order to induce private capital to undertake the construction of Veterans Emergency Rental Housing projects, assurance was necessary that the rights of all parties should be fixed and that no rights should be subject to the uncertainties of future changes in the rules and regulations of the Federal Housing Administration. Therefore, Appellant, as a guarantee to the builders of such projects, issued regulations to effect such assurance.

We refer the Court to the following pertinent sections of the 1949 edition of the Code of Federal Regulations, Title 24, Housing and Housing Credit, Part 282, dealing with Multifamily War Housing Insurance:

Section 282.1:

"*Citations.* The regulations in this part may be cited as 24 CFR, Part 282, and referred to as 'Regulations of the Federal Housing Commissioner under Section 608 of the National Housing Act, issued May 26, 1942'."

Section 282.19:

"*Amendments to Regulations.* The regulations in this part may be amended by the Commissioner at any time and from time to time, in whole or in part, *but such amendment shall not affect the contract of insurance on any mortgage already insured or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure.*" (Emphasis added.)

Section 282.20:

"*Effective Date.* The regulations in this part shall be effective *as to all mortgages with respect to which a commitment to insure under section 608 is issued on or after August 15, 1946.* * * *" (Emphasis added.)

The foregoing regulations were spelled out in the Code of Federal Regulations published by the United States Government and in existence at the time the contract of insurance of Appellee's mortgage was executed December 30, 1949, and available to the parties for their guidance during the negotiations between them. The parties had a right to rely upon the terms of such regulations and are bound by them.

Reference to the endorsement of the Federal Housing Administration upon the reverse side of the mortgage note in question shows (R. 106-107):

"Insured under section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949.

"To the extent of advances approved by the Commissioner.

"Federal Housing Commissioner, by H. E. Bailey, Authorized Agent.

"Date, December 30, 1949."

We repeat: *"Insured under section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949."*

B. The Law in Effect on December 30, 1949 Governing the Rights and Obligations of the Parties

As previously shown in this Brief, supra, pp. 11-21, Section 608, as amended by the Veterans Emergency Housing Act of 1946, was intended and designed exclusively to furnish temporary rental accommodations for the returning veterans of World War II. The caption of the Veterans Emergency Housing Act is as follows:

"An Act to expedite the availability of housing for veterans of World War II by expediting the production and allocation of materials for housing purposes and by curbing excessive pricing of new housing, and for other purposes." (60 Stat. 207.)

The Act provided:

"This Act may be cited as the 'Veterans' Emergency Housing Act of 1946'."

The housing shortage for veterans continued from year to year and section 608 was extended through March 1, 1950. The reason for the Veterans Emergency Housing Act is given as follows in Section 10 (a) thereof:

"In order to assist in relieving the acute shortage of housing which now exists and to increase the supply of

housing accommodations available to veterans of World War II. * * *'' (60 Stat. 212)

The law provided that the only limit on the use of a rental housing project insured thereunder was that preference of occupancy of the projects should be given to (a) Veterans of World War II; (b) immediate families of veterans of World War II, Section 10 (f) (2) of the Act reading:

> ''Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families * * * shall be provided under such regulations and procedures as may be prescribed by the Administration.'' (60 Stat. 214.)

As will be hereinafter shown by reference to the Act, all other limitations on the use of the apartments in the building were left to the discretion of the Commissioner in the exercise of his authority as the sole preferred stockholder in said corporation. We will further show that he did not elect to prohibit rentals of apartments in Appellee's project for terms of less than thirty days.

C. The National Housing Act—Title VI, Section 608

The National Housing Act will show that the only provision of section 608 of title VI in effect on December 30, 1949, granting the Commissioner authority to regulate in any manner whatsoever a project constructed under that section is contained in subsection (b)(1) thereof as follows:

> ''The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges,

capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with and acquire for not to exceed $100 stock or interest in any such mortgagor as the Commissioner may deem necessary to render effective such restriction or regulation. * * *'' (56 Stat. 303; 12 USC 1743 (b) (1)).

It is to be noted that this provision of the law imposes no regulations upon the operation of mortgagor corporations such as the Appellee, but merely authorizes the Commissioner ''in his discretion'' to require such mortgagor corporations to be regulated and to acquire for that purpose stock or interest in such corporations.

D. Administrative Rules and Regulations of The Federal Housing Commissioner

Looking into the Administrative Rules and Regulations of the Federal Housing Commissioner, applicable to mortgages insured under Title VI, Section 608 of the National Housing Act, we find in 24 CFR 283.28 that the Commissioner did elect to exercise his discretion by requiring the regulation of corporate mortgagors, such as Appellee through the ownership of special stock therein, the regulation reading as follows:

''(a) A corporate mortgagor or trust shall be regulated through the ownership by the Commissioner of certain shares of special stock (or other evidence of beneficial interest in the mortgagor) which stock or interest will acquire majority voting rights in the event of default under the mortgage or violation of provisions of the charter of the mortgagor, or the violation of any valid agreement entered into between the mortgagor, the mortgagee and/or the Commissioner, but only for a period co-extensive with the duration of such default or violation. * * *''

It will be noted that such regulation by the Commissioner was to be exercised exclusively through the ownership "of certain shares of special stock", and that such stock would acquire majority voting rights only in the event of (1) default under the mortgage, or (2) violation of the provisions of the charter of the mortgagor, or (3) violation of any valid agreement entered into between the mortgagor, the mortgagee and the Commissioner.

Under the terms of this regulation, which has the force and effect of law, before the Commissioner could exercise any control over the mortgagor, one of the above mentioned conditions would have to occur. There is no question in the present case of any default under the mortgage or the violation of any agreement between the mortgagor and mortgagee and/or the Commissioner. The only remaining question then is whether Appellee has violated any of the provisions of its charter, which we ask the Court to recall, was of a specific form, containing the wording and provisions required and prescribed by the Federal Housing Administration (Pl. Ex. 19; R. 42, 184-192).

E. Provisions of Corporate Charter

The only rights which Appellant has to control rentals of apartments in Appellee's building are those derived from Appellant's ownership of preferred stock in the Appellee corporation. As Appellant has conceded, in Note 7 on page 9 of its Brief filed herein:

> "This and all other powers afforded the Administration under appellee's charter result from the Administration's ownership of appellee's preferred stock."

An examination of Appellee's charter is therefore necessary in order to determine just what powers it grants to Appellant as preferred stockholder. Article Fifth, paragraph (e) of such charter provides the only method of

exercising control by the preferred stockholder, the ouster of existing directors and installation of new ones of Appellant's choice, only in the event of "default" by the corporation, the pertinent portion of such article reading as follows:

> "(e) in the event of any default by the corporation, as hereinafter defined, and during the period of such default, the owners of the preferred stock, voting as a class shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead." (Pl. Ex. 19; R. 42, 186.)

Reference to the charter will show that the failure of the corporation to perform any of the conditions or provisions of the charter would be considered a default thereunder. Therefore, to determine whether the rental of apartments in Appellee's building for less than thirty days was a default under the charter will require an examination of the charter.

"Default" is defined in detail in Article Seventh, paragraph (a), as among other things, the failure of the corporation to perform any of the covenants, conditions or provisions required by the charter. Such paragraph reads as follows:

> "(a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after commencement, any receivership, bankruptcy or other form of liquidation instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by the terms of such instruments; (3) the failure

of the corporation to establish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties, or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated." (Pl. Ex. 19, R. 42, 187.)

The covenants, conditions and provisions required of Appellee by its charter are set out in detail in Article Sixth and in Article Eighth, paragraph (a)(1) as follows:

"Sixth. The corporation shall not without prior approval of the holders of a majority of the shares of Preferred Stock, given either in writing or by vote at a meeting of the Preferred Stockholders called for that purpose (a) assign, transfer, dispose of or encumber any real or personal property, including rents, except as specifically permitted by the terms of the mortgage, (b) remodel, reconstruct, demolish or subtract from the premises constituting the project and subject to such mortgage, (c) permit the occupancy of any of the dwelling accommodations of the corporation except at or below the rents fixed by the schedule of rentals provided hereinafter, (d) require as a condition to the occupancy or leasing of any unit in the project the purchase of any corporate stock either from the corporation or any stockholder or the payments of any consideration other than the reasonable rental provided for in the schedule of rentals to be filed with and ap-

proved by the holders of the Preferred Stock, as provided hereinafter, (e) consolidate or merge the corporation into or with any other corporation; go into voluntary liquidation; carry into effect any plan of reorganization of the corporation; redeem or cancel any of its shares of Preferred Stock, or effect any changes whatsoever in the capital stock; alter or amend the certificate of incorporation or fail to establish and maintain reserves as set forth in this Certificate of Incorporation, (f) require as a condition to the occupancy or leasing of any unit in the project the payment to or deposit with the corporation, or any person or persons, of any amount other than the payment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the covenants of the lease." (Pl. Ex. 19; R. 42, 187.)

"Eighth. The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation, the directors and the stockholders.

"(a)(1) Dwelling accommodations of the corporation shall be rented at a maximum average rental per room per months fixed by the Board of Directors of the corporation and approved by the holders of the Preferred Stock. A schedule of rentals for the reasonable rental value of each apartment based upon the average as so determined shall be filed with the holders of the Preferred Stock, prior to leasing or offering for lease of any of the dwelling accommodations of the project, and when approved by them, shall thereafter be maintained except as provided in Article Sixth hereof. *Dwelling accommodations of the corporation shall not be rented for a period in excess of three years* nor shall

the property be rented as an entirety without prior written approval of the Preferred Stockholders. Store accommodations shall be rented at a rental to be fixed by the directors with the prior written approval of the holders of the Preferred Stock. (2) The corporation shall have the right to charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between tenant and the corporation with the written approval of the holders of a majority of the shares of Preferred Stock, for any facilities and/or services which may be furnished by the corporation to such tenant upon his request, over and above the facilities and services to which such tenant may be entitled by virtue of his lease, including among other things, telephone operator and switchboard services, electric current, gas, air cooling and conditioning and other additional or extraordinary facilities or services which may be furnished by the corporation in connection with the operation of such housing facilities." (Pl. Ex. 19; R. 42, 189-190; emphasis added.)

Careful scrutiny of the above quoted charter provisions, being the only pertinent parts thereof, discloses no language whatsoever suggesting, directly or indirectly, any prohibitions against the rental of apartments in Appellee's building for any periods of less than thirty days. An examination of these charter provisions does disclose, however, that the Commissioner gave consideration to the term of rentals of apartments in the building and elected to prohibit such rentals for any periods in excess of three years, the Commissioner's exact language being, "Dwelling accommodations of the corporation shall not be rented for a period in excess of three years." (Article Eighth (a)(1) above.)

The Commissioner, having given consideration to the terms of rental of apartments in the Appellee's project, and having specifically chosen to limit the maximum term of such rental of such apartments, and having failed to limit the minimum term of such rentals, we submit, shows an intention on his part to not place any minimum limit on the rental term for which an apartment might be rented, and that the general rule of construction of statutes and contracts is indeed applicable here. The general rule, we feel, is concisely stated in 82 C.J.S. 668; Statutes, Sec. 333a:

> "Under the general rule of express mention and implied exclusion, the express mention of one matter excludes other similar matters not mentioned; every positive direction in a statute contains an implication against everything contrary to it; the specification of one particular class excludes all other classes; and an affirmative description of powers granted implies a denial of non-described powers."

The charter sets out in detail the matters subject to regulation by Appellant as preferred stockholder. Those matters are specifically enumerated, and any others are just as specifically excluded under the maxim:

> "The expression of the one is the exclusion of the other." *Arthur* v. *Cumming*, 91 U.S. 362, 364.
>
> "Generally speaking a 'legislative affirmative description' implies denial of the nondescribed powers." *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533.

The Appellant in its brief, page 31, attempts to contend that the provision in the charter "engage in no business other than the construction and operation of a rental housing project or projects" should be construed to prohibit

the rentals of apartments in Appellee's project for less than thirty days. We submit that such contention is without any merit. There is certainly nothing in the term, "operation of a rental housing project or projects" which would preclude the rental of some of the apartments in such project for less than thirty days when there was no demand for such apartments for a greater period of time.

The charter of the Appellee corporation (Pl. Ex. 19; R. 42, 184, 185) shows the purpose of the corporation as follows:

> "Third: The purpose for which the corporation is formed and the business and objects to be carried on and promoted by it are as follows:
>
> "(d) * * * So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a rental housing project or projects.
>
> "(e) to enter into, perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of any one or more of the purposes of the corporation."

We submit that the normal operation of an apartment building such as Appellee's, containing as it does twelve stories and 156 apartments, contemplates that, from time to time there would be the rental of some of the apartments in the buildings, if condition demanded, for terms of less than thirty days. Such incidental rentals are provided for in Article Third (e) of the charter, quoted above.

To Summarize:

First: Section 608 of the National Housing Act left it to the discretion of the Commissioner to determine whether he would attempt to control the operation of a 608 project, such as the Appellee's apartment building;

Second: The Commissioner elected to control the operation of the Appellee's apartment building through the ownership of all preferred stock in the Appellee's corporation;

Third: The only restriction placed upon the term of rental of an apartment was that an apartment could not be leased for more than three years.

F. Limitation Upon Use of Projects Constructed Under Title VI, Section 608, of The National Housing Act

We submit that this case is not concerned with the authority, (or lack of it) on the part of the Appellant to "insure hotel properties", but rather, with its authority to insure mortgages upon certain types of rental properties.

We refer the Court to 24 C.F.R. 280.34 of the Administrative Rules and Regulations under Section 608 of the National Housing Act which were in effect at the time of the insurance of the mortgage, which reads:

> "280.34. *Development of property.* At the time the mortgage is insured the mortgagor shall have constructed and completed or shall be obligated to construct and complete new housing accommodations on the mortgaged property *designed principally for residential use, conforming to standards satisfactory to the Commissioner*, and consisting of not less than eight (8) rentable dwelling units on one site and may be detached, semidetached, or row houses, or multifamily structures." (Emphasis added.)

This regulation relates, as noted, only to the design and does not attempt to require such building to be designed "exclusively" for residential purposes as contended by the Appellant, but that it merely be designed "principally"

for residential use. The word "principally" does not mean "exclusively", but means chiefly, mainly, primarily or in the greater part.

Black's Law Dictionary (3d ed., 1933) defines "principal" (p. 1415) as "chief; leading; most important or considerable; primary, original, highest in rank, authority, character, importance, or degree." In contrast, the same dictionary defines "exclusively" (p. 715) as "only, solely, purely, wholly, to the exclusion of other things."

The words "principally engaged", in a statute exempting from execution certain articles necessary to carry on the occupation in which one is principally engaged, are not to be construed with reference to the productiveness or profit of one kind of business over another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party *chiefly* relies for a livelihood, and that engrosses *the most of his time and attention*, not for a day, or a week, or a month, but through the year. *Smalley* v. *Masten*, 8 Mich. 529, 530.

We submit that the word "principally" carries no connotation of exclusiveness; that the words "principally for residential use" do not mean "exclusively for residential use"; that they mean "chiefly, mainly, primarily for residential use", and that as long as Appellee's apartment building is employed *chiefly, mainly* or *primarily* or *for the most part* for residential use, Appellee corporation is strictly complying with the requirement of the law and regulations.

We submit that any attempt to give the word "principally" an interpretation meaning "exclusively" would be contrary to ordinary, common meaning and understanding of the word "principally" and contrary to the legal presumption that Congress, in enacting laws, or rule making

bodies in promulgating rules, understood the meaning of the words used and then used them in their ordinary and common meaning.

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar." *United States* v. *Goldenberg*, 168 U.S. 95, 102, 103.
>
> "Congress will be presumed to have used a word in its usual and well-settled sense." *United States* v. *Stewart*, 311 U.S. 60, 63.
>
> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification'. Levy's Lessee v. M'Cartee, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws'. Maillard v. Lawrence, 16 How. 251, 261. And see United States v. Buffalo Gas Co., 172 U.S. 339, 341; United States v. First Nat. Bank, 234 U.S. 245, 258; Carminetti v. United States, 242 U.S. 470, 485. As was said in Lynch v. Alworth-Stephens Co. 267 U.S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" *Old Colony R. Co.* v. *Comm'r of Int. Rev.*, 284 U.S. 552, 560.

Appellant is asking the Court to change or distort the meaning of the word "principally" so as to mean "exclusively". It is asking this Court to change the wording of 24 C.F.R. 280.34 from "mortgaged property designed *prin-*

cipally for residential use" to "mortgaged property designed *exclusively* for residential use." We do not believe that this Court will ever adopt such a distorted construction. In *62 Cases, More or Less,* v. *United States,* 340 U.S. 593, 596, this Court said:

> "But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

Upon the undisputed facts of this case, we submit that Appellee's project—The Darlington—has never been operated in any manner prohibited by or even inconsistent with the pupose or provisions of Section 608, the Federal Housing Administration Rules and Regulations or the Darlington's charter. As previously stated, the Darlington is not a hotel and is not operated as a hotel. There can be no question that the Darlington is both *designed* and *used* "principally for residential purposes."

The facts in the case at bar are strikingly similar to those involved in the New York case of *People ex rel. Waitt Operating Co., Inc.* v. *Goldfogle et al,* 121 Misc. Rep. 341, 201 N.Y. Supp. 262. That case involved the application of a New York City ordinance which exempted from certain taxation new buildings "planned for *dwelling purposes exclusively, except* hotels." (Emphasis added.) The only question was whether or not plaintiff's building—called "Hotel Weylin"—was a hotel within the meaning of the ordinance. (The defendants, Commissioners of Taxes and Assessments, had held that it was.) In the words of the Court (201 N.Y. Supp. 262, 263):

> "It is situated at the southeast corner of Madison avenue and Fifty-Fourth street and is 15 stories in height. On the ground floor are stores and a restaurant,

not conducted by the relator, but in part controlled by it, through a rather elaborate contract of lease. There are 141 rooms in the building, substantially 10 on a floor. The suites are so arranged that the rooms may be grouped in suites of 1 and 2 rooms with bath, 3 and 4 rooms and two baths, and 5 rooms with three baths. No suites of more than 5 rooms have ever been occupied as such. One hundred and thirteen rooms are leased to permanent tenants; 28 rooms are used by transients; 74 rooms were furnished by the landlord, of which 56 have been leased on long-term leases, and 28 rooms devoted to transients. At the entrance hall is a small 'desk', with a telephone 'central', with which every room is connected. There are no kitchens in any of the rooms. There is an entrance to the restaurant from the main hall of the building. Linens are supplied to transients and to occupants of the furnished rooms under lease. Very limited personal service is furnished. There are two extra doormen, who do errands in exchange for gratuities. Ice water is obtained in the same way by telephoning the restaurant. There are no public rooms in the building, except a small reception room. The building was originally planned as a 'non-housekeeping apartment house'. Subsequently it was called 'Hotel Weylin', which name has been preserved."

The Court held the Weylin not to be a hotel, using the following language (201 N.Y. Supp. 262, 264):

"* * * I see no ground for holding that this building does not come within the exemptions of the tax ordinance. The mere fact that a building constructed and operated as a hotel in the common acceptance of that term may be occupied by a few tenants on long leases

would certainly not change the character of the building as a whole. The converse is true here. The rooms occupied by transients, forming but 20 per cent. of the total number of rooms, are being so used only temporarily, in order to derive an income therefrom pending attempts to lease them for long terms, like the rest of the rooms. *Even the 'transient' rooms are charged for by the room, and not by the number of persons who occupy them.* The building is without any of the public rooms or public accommodations usually associated with the idea of a hotel. *Under these circumstances I think that the building is to be regarded as having maintained its original character of an apartment house, unaffected by the casual fact that some of the rooms are temporarily devoted to purposes which have some of the elements of hotel accommodation.*" (Emphasis added).

One would have to search far indeed to find two cases involving facts so closely parallel, and we respectfully submit that the logic and language of the Court in the above quoted decision is equally applicable to The Darlington.

G. Administrative Interpretation Placed on Title VI, Section 608 of the National Housing Act by Officials of the Federal Housing Administration

The Appellant has devoted eight pages (30-38) or approximately one-third of its Argument to the assertion that the Federal Housing Administration has uniformly interpreted Section 608 as not entitling owners of insured projects to rent to transients. We quote from Page 30 of Appellant's Brief:

"C. *The Federal Housing Administration has uniformly interpreted Section 608 as not entitling owners of insured projects to rent to transients.*

> "Beginning in 1947, long before appellee's project was approved by the Federal Housing Administration, Section 608 was administratively construed as not permitting rentals to transients."

We regret but we must challenge this assertion by the Appellant, for such is not sustained by the facts nor the record in this case.

In its Jurisdictional Statement, Appellant says that it relies for this assertion on the provisions of 24 CFR 280.34 (which provisions require only that Section 608 projects be designed "principally for residential use") (Jurisdictional Statement, p. 5; note 16, p. 16). Since it is obvious that The Darlington Apartments are not only designed, but used, principally for residential use, Appellant's stated reliance upon 24 CFR 280.34 is misplaced. We are therefore forced to believe that possibly Appellant also relies on those portions of Plaintiff's Exhibit 31 (R. 45, 226) which it has printed as Appendix C to its Brief at Page 59, reading in part as follows:

> "(p. 6) Rental housing projects in distinctly commercial areas, hotels, apartment hotels, dormitories, club buildings partly devoted to residential use, farm dwellings, or 'company housing' or other housing dependent on a single industry, are not considered acceptable, as they lack these characteristics."

The above has no applicability to the facts in this case. The Darlington is not a hotel. It is certainly not a dormitory or a club building any more than it is a farm building.

The Darlington is a twelve story apartment building consisting of 99 two-room apartments; 11 two-and-one-half-room apartments, 41 three-room apartments, 3 four-room apartments, and 2 six-room apartments. (Pl. Ex. 24-A; R. 43, 194). The Federal Housing Administration, before

construction commenced in connection with the Darlington Apartments, had to find the same acceptable to the Administration or it would have never approved the application for the insured mortgage loan or insured the same.

The further fallacy of the Appellant's assertion that the Federal Housing Administration has uniformly interpreted section 608 as not entitling the owners thereof to rent apartments to transients is conclusively shown by reference to the record in this case.

First, it is conceded that there is no provision in the Act that prohibits rentals of apartments to transients or for less than thirty days.

Second, it is conceded that there is no rule or regulation that would prohibit the rental of apartments in section 608 projects to transients or for less than thirty days.

Third, the Commissioner of the Federal Housing Administration was authorized through preferred stock ownership to regulate by charter provisions the operation of a section 608 project in any manner whatsoever that he desired. No prohibition is to be found in the charter of the corporation preventing the rental of apartments therein to transients or for less than thirty days.

Fourth, the American Hotel Association, in securing the enactment of section 513 of the Housing Act of 1954, under consideration in this case, stated that it sought the passage of the Act in order to prohibit the rentals of apartments in 608 projects to transients or for less than thirty days because the Federal Housing Administration officials had construed the law and the rules and regulations as permitting transient rentals and rentals for less than thirty days, as long as the rental charge per day did not exceed one-thirtieth of the agreed monthly rental. We invite the Courts attention to the testimony of Arthur J. Packard, Chairman of the Board, American Hotel Association, before the Senate Committee on Banking and Currency, during the hearings

on the Housing Act of 1954 (Senate Hearings, Part 1, pp. 655, 656-657; Pl. Ex. 27; R. 44, 196, 198):

> "We have tried for 4 years, through every known administrative approach, to have this problem whipped by the FHA. But having failed in this direction, we are obliged to seek the assistance of your committee, and to appeal to you for some statutory safeguard against this continued unfair competition."
>
> . . . . . .
>
> "As I mentioned before, we have tried for 4 or 5 years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743(b)(1), in connection with section 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved. At the outset, the agency always required approval of all rent schedules. And these were normally expressed in monthly rentals. But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice."

Fifth, the Appellant's witness, W. Withers Adickes (R. 68), Assistant State Director for South Carolina and former State Director, testified that it was not until February 1952, some years after the insurance of the mortgage over the Appellee's apartment project, that his office ever received any notice that there would have to be a stipulation in

connection with section 608 projects against rental of apartments for less than thirty days. We quote the testimony (R. 74):

> "Q. Is this the first notice that you recollect that the Federal Housing Administration received where it stated that you would have to put into the contract a stipulation that there should not be rented any apartment for less than 30 days? A. That is the first one I remember.
>
> "Q. As far as you remember, that is the first time? A. As far as I know, that is the first.
>
> "Q. And that is the—— A. February '52."

Sixth, the complete fallacy of any assertion that the Federal Housing Administration had uniformly interpreted section 608 as prohibiting transient rentals is shown by the necessity for the passage of section 513 of the Housing Act of 1954—if such transient rentals were prohibited, why the necessity for the Act? Further, the wording of section 513, paragraph (b) acknowledges that the Commissioner had permitted transient rentals for less than thirty days in section 608 insured projects. We quote from the Act, (Appendix "A" page 86):

> "(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area

which the Commissioner determines to be a resort area, * * *."

Seventh, just how the Federal Housing Administration has uniformly interpreted section 608 as not entitling owners of insured projects to rent to transients and yet has allowed exceptions in 10,669 apartments in the State of Florida alone is hard to conceive. The 23rd Annual Report of the Federal Housing Administration for the year ending December 1956 shows, Table III-16 on page 30, that it had insured under section 608 in the State of Florida 10,669 apartment units and the Congressional Record for July 28, 1954, (100 Cong. Rec. 11,883) shows that the whole State of Florida is a resort area under the bill, and we quote:

"Mr. Smathers. Mr. President, will the able chairman yield so that I may ask a question of him?

"Mr. Capehart. I yield.

"Mr. Smathers. I call the able chairman's attention to that paragraph on page 23 of the conference report where reference is made to tourist areas. With respect to section 603 and 608 projects is it the Senator's understanding that a tourist area in Florida would include the whole State of Florida?

"Mr. Capehart. I would think that the State of Florida would be considered a tourist area. I would say so."

Lastly, and we take it to be an admission, the Appellant, on August 17, 1956, forwarded to all mortgagors under Section 608 a letter (Pl. Ex. 43; R, 126, 237), in which it stated as follows:

"*Recent determinations* with respect to Administrative policy have resulted in amendments to the rules of the Federal Housing Administration and the issuance of a revised Model Form of Corporate Charter, * * *". (Emphasis added.)

Attached to the said letter going to all mortgagors under Section 608 was the new model form of corporate charter (Pl. Ex. 43; R, 126, 239) where the Federal Housing Administration, for the first time in the year 1956, placed in its charter the following new provisions: that the corporation to be formed would be for the purpose of renting apartments therein on a monthly or yearly basis and that the dwelling accommodations therein could not be rented for periods of less than one month. We quote from the charter, Articles III and VII (Pl. Ex. 43; R, 126, 239-240):

"ARTICLE III—PURPOSES

The purpose for which the Corporation is formed and the business and objects to be carried on by it are as follows:

"(a) To create a private Corporation to construct and operate a rental housing project * * * for the rental of units on a *monthly* or yearly basis." (Emphasis added.)

* * * * * * *

"ARTICLE VII—PROVISIONS FOR CORPORATE OPERATION

* * * * * * *

"Dwelling accommodations shall not be rented for periods of *less than one month* nor in excess of three years." (Emphasis added.)

It is regrettable, to say the least, if the Federal Housing Administration had ever intended, prior to the Housing Act of 1954, that it would prohibit rental of apartments in Section 608 projects for less than thirty days, that such provisions were not inserted by the Appellant somewhere

in the charters which it wrote and prescribed for the Appellee and other contemporary builders who responded to the call to provide temporary housing for the returning veterans of World War II.

We submit, as the Court below stated (R, 116-117), in truth and in fact, the Federal Housing Administration never thought, nor cared, whether apartments in Section 608 projects were rented for thirty days or less. It was busy carrying out the mandate of Congress to provide housing for veterans.

This Court has stated in a somewhat similar situation where no consideration was given by Congress to the subject matter of the case, as follows:

> "Ascertainment of the intention of Congress in this situation is impossible. *It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it.* Had the omission of a direct prohibition of this employment been called to its intention, it might well have supplied it, for any reason we can see. Congress of course has the right to be indirect where it could be direct and to be obscure and confusing where it could be clear and simple. But had it determined to reach this employment, we do not think it would have done so by artfiice in preference to plain terms. *It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction.* We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process." *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508. (Emphasis added.)

H. The Appellant Is Engaged In The Insurance Business And Is Subject To All Laws And Rules Of Contract Construction Applicable To Private Corporations And All Ambiguities In Its Regulations Must Be Construed Against It

That the Federal Housing Administration is in the insurance business is shown in its Handbook for Employees (Pl. Ex. 32, R, 45, 227):

> "The first thing to learn about the FHA is that it does not lend money and does not plan and build housing • • •"
>
> "• • • *the FHA provides insurance against loss on several types of loans made by private lending institutions.*" (Emphasis added.)
>
> • • • • • • •
>
> "All mortgage loans insured by the FHA provide for • • • the FHA mortgage insurance premium of 1/2 of 1 percent annually on outstanding balances • • •."

Other courts have recognized the role of the Federal Housing Administration in the insurance business:

> "Defendant contends that the United States has not agreed to pay interest in such a case. The answer is that the United States agreed to be sued as an insurer; and the recovery of interest for delay in payment is an ordinary incident of a suit on an insurance contract." *Ferguson* v. *Union National Bank*, 4 Cir., 126 F. 2d 753, 759.

This Court has held:

> "• • • it must be presumed that when Congress launched a governmental agency into the commercial

world and endowed it with authority 'to sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245.

This Court in *Lynch* v. *United States*, 292 U.S. 571, 578, said:

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

At Page 580:

"'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen' The Sinking Fund Cases, 99 U.S. 700, 719."

There is no ambiguity or uncertainty in the wording of Section 608 nor in the rules and regulations of the Commissioner thereunder, nor in Appellee's charter. We respectfully submit, however, that if any doubt or uncertainty does exist, it should be resolved in favor of Appellee. *Garrison* v. *United States*, 7 Wall. 688; *Cole* v. *Young*, 351, U.S. 536. Thus in *Garrison* v. *United States*, this Court said (7 Wall. 688, 690), in construing ambiguous language used by the Government in a contract:

"Its doubtful expressions should, therefore, according to a well known rule be construed most strongly against the party who uses the language."

And in *Cole* v. *Young*, this Court said (351 U.S. 536, 556) in construing an executive order characterized as "awkward":

> "Moreover whatever the practical reasons that may have dictated the awkward form of the order, its failure to state explicitly what was meant is the fault of the government. Any ambiguities should therefore be resolved against the government. * * *."

Certainly, the failure to state explicitly in the Federal Housing Administration's Rules and Regulations or in Appellee's charter an intention that rentals for less than thirty days were prohibited (if any such intent in fact existed, which we deny), was exclusively the fault of Federal Housing Administration, Appellant herein.

As to The Second Question

II. Appellant cannot use the terms of Section 513 of the Housing Act of 1954 to retroactively deprive the appellee of its right to rent some of the apartments in its building for less than thirty days

As shown above, the Appellee was not prohibited by any terms or provisions of the Housing Act, the rules and regulations of the Commissioner, the Appellee's charter of incorporation, or any contract in effect on December 30, 1949, the date of insurance of the mortgage in question by the Appellant, from renting apartments in its building for terms of less than thirty days. There being no such prohibition, the Appellee had the right to rent such apartments for terms of less than thirty days, or indeed, for any term not in excess of three years. Having this valuable right, and having exercised such right free and unmolested for a period of approximately three years,

Appellee urges that such right was a vested right, and is protected by the United States Constitution.

A. Definition of "Vested Right"

The following definitions of the term "vested right" have been consistently followed by our courts:

> "A 'vested right' is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate, fixed right of present or future enjoyment'; and by Chancellor Kent as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment'. 4 Kent, Comm. 202 It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest' * * * Const. Law 332." *Pearsall* v. *Great Northern Ry. Co.*, 161 U.S. 646, 673.
>
> "It is defined as 'an immediate fixed right of present or future enjoyment' and 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.'** * *. A right is 'vested' when there is an ascertained person with a present right to present or future enjoyment; * * *" 11 Am. Jur. 1199, Const. L., Sec. 370.
>
> "Vested rights may be created by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection." 11 Am. Jur. 1200, Const. L., Sec. 371.

We submit that the Appellee's right to rent apartments in its building for terms of less than thirty days has been shown to be a most valuable and substantial right, necessary to protect the Appellee from the loss of its property

and its investment of some four hundred thousand dollars (R. 5, 103), and necessary to provide the funds for the Appellee to make the payments called for by its mortgage; and is so obviously a vested right such as is entitled to constitutional protection, that we will forego further argument on that point.

B. Vested Rights May Not Be Impaired By Retroactive Or Retrospective Laws

While there is no direct constitutional prohibition against the enactment by Congress of retrospective legislation, such legislation cannot operate retroactively so as to impair or divest "vested rights", and any attempt now on the part of the Appellant to construe or apply the terms of the Housing Act of 1954 so as to prohibit the Appellee from renting apartments in its building for terms of less than 30 days, would divest, destroy, or impair a vested right of the Appellee and would result in an unconstitutional retroactive operation of the Housing Act of 1954.

While the Constitution does not prohibit retrospective legislation, as such, by the Congress, such legislation cannot destroy or impair vested rights.

> "In the sense in which it is constitutionally objectionable, * * * a retroactive or retrospective law, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past * * *." 16-A C.J.S. 91, Const. L., Sec. 414

Since its establishment this Court has in an unbroken line of decisions, protected the citizens in the enjoyment of their vested rights. This principle was clearly and forcibly announced by this Court in the famous "Dartmouth Col-

lege Case" (*The Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518) which involved the construction of the rights of Dartmouth College under the charter granted it by the King prior to the independence of the United States. Chief Justice John Marshall stated (4 Wheat. 518, 625):

> "On the judges of this court [the United States Supreme Court] then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink."

It is true that the Dartmouth College case involved the attempted impairment of a contract by a State legislature, but this Court has repeatedly held that contracts and vested rights are protected from Congressional interference by the Fifth Amendment to our Constitution. The doctrine is well expressed in *Union Pacific Railway Co.* v. *United States* (The Sinking Fund Cases), 99 U.S. 700, decided in 1878, which case involved the construction of a contract between the United States Government and the Union Pacific Railway Company, and the attempt of Congress through subsequent legislation to change the terms of the contract or impose additional obligations on the railroad company. In that case this Court held (99 U.S. 700, 719):

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back

to themselves, without making compensation, the lands they have given this Corporation to aid in the construction of its railroad. Neither can they by legislation compel the Corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that term implies as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Again in the case of *Lynch* v. *United States*, 292 U.S. 571 this Court, in a unanimous decision involving the retroactive provisions of an Act of Congress affecting the rights of the Plaintiff under a War Risk Insurance Contract, held as follows (292 U.S. 571, 579-580):

"The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central Pacific R. Co., 118 U.S. 235, 238; United States v. Northern Pacific Ry. Co., 256 U.S. 51, 64, 67. *When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.* That the contracts of war risk insurance were valid when made is not questioned. As

Congress had the power to authorize the Bureau of War Risk Insurance to issue them, *the due process clause prohibits the United States from annulling them*, unless, indeed, the action taken falls within the federal police power or some other paramount power.

"The Solicitor General does not suggest either in brief or argument that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States.' *Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.* No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But *Congress was without power to reduce expenditures by abrogating contractual obligations of the United States.* To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen'. The Sinking Fund cases, 99 U.S. 700, 719." (Emphasis added.)

We respectfully submit that the Appellee's vested right to rent apartments in its building for terms of less than

thirty days is protected by the Constitution against impairment whether by Congress or by the Federal Housing Administration.

C. Interpretation of Legislative Intent Is a Judicial Function

Section 513(a) of the 1954 Amendment to the National Housing Act states:

> "That Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use, and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding."

Section 513(e) of said Amendment states that:

> "The term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for any period less than 30 days shall in any event constitute rental for such purposes."

We submit that such declaration of its intent by Congress, although binding upon the courts in situations occurring subsequent to its enactment, cannot relate back retroactively to affect substantial vested rights in existence before its passage.

This Court has consistently held that the interpretation of statutes is a judicial, not a legislative function, and that a legislative declaration of legislative intent cannot operate retroactively so as to invade prior rights.

> "Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to

bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are passed, provided no constitutional right of the party concerned is violated." (*Stockdale v. Atlantic Insurance Co.*, 20 Wall. 323, 331.)

"It is undoubtedly true that, in our system of government the law-making power is vested in Congress, and the power to construe laws in the course of their administration between citizens, in the courts. And it may be conceded that Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute." Ibid., 20 Wall 323, 331.

This Court, following the reasoning and logic in *Stockdale* v. *Atlantic Insurance Co.*, supra, in the case of *Town of Koshkonong* v. *Burton*, 104 U.S. 668, has specifically held that declaratory laws as far as they attempt to operate on vested rights can have no legal effect. This Court quoted with approval from *Salters* v. *Tobias*, 3 Paige 344, as follows (104 U.S. 668, 678, 679):

"'* * * In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the Legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it.' When counsel in *Ogden* v. *Blackledge*,

2 Cranch 276, announced that, to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point."

We submit a most interesting sidelight that shows the fallacy of one Congress attempting to declare in retrospect what was the intention or the meaning of the words used by a past Congress will be found by reference to the hearings before the Committee on Banking and Currency of the United States Senate in connection with the very statute under consideration here, the Housing Act of 1954. Senator Capehart, sitting as Chairman of said Committee, during hearings in March and April of 1954, said in reference to Section 608, *"I didn't write the law, it was written back in 1940. I wasn't here so I can't tell what the intention was."* (Senate Hearings, Part 3, p. 1764; Pl. Ex. 28; R. 44, 218; emphasis added).

It, therefore, clearly follows that Section 513 of the Housing Act of 1954 has no application to the Appellee's apartment project and its operation, and that even as a declaratory statute it cannot be related back to the operation of Appellee's apartment project so as to deprive the Appellee of its vested rights retrospectively.

AS TO THE THIRD QUESTION

III. Is the constitutionality of Section 513 of the Housing Act of 1954 necessarily involved in the determination of the respective rights of the parties to this action?

The wording of section 513 of the Housing Act of 1954 expressly excepts from its provisions projects such as the

Appellee's, operated as it is, which were insured prior to the effective date of the said Act.

The record of this case will show that the Appellee has contended throughout that the wording of section 513 of the Housing Act of 1954 precluded the same from being applied to mortgages insured prior to the passage of the Act. The Honorable Walter E. Hoffman, the District Judge before whom this matter originally came, requested the convening of a three-judge court, stating, and we quote (R. 33):

> "Should Plaintiff ultimately prevail, it is difficult to believe that any court could avoid a full discussion of the constitutionality of this section, as the very wording of the act expresses a retroactive intent."

The Honorable John J. Parker, Chief Judge of the Fourth Circuit, issued an order convening a three-judge court (R. 34). Later, however, after the filing of briefs, in a *per curiam* opinion concurred in by Judge Hoffman and Judge Timmerman, the three-judge court was dissolved on the ground that the real question involved in the present case was one of statutory interpretation rather than the validity of the statute, the *per curiam* opinion reading as follows (134 F. Supp. 337, 338):

> "The apartment house was erected and the mortgage thereon executed by plaintiff and insured by the Federal Housing Administration prior to the passage of the Federal Housing Act of 1954, 68 Stat. 590, and nothing in any of the contracts relating to the construction of the apartment house, the execution of the mortgage thereon or the insuring of the same by the Federal Housing Administration limits the right of plaintiff with respect to the rental of apartments for transient purposes or for less than thirty days. * * * * Since the passage of the Federal Housing Act of 1954 the Fed-

eral Housing Administration has attempted to force plaintiff to desist from this rental practice, contending that same is forbidden by the provisions of that act. Plaintiff contends that the act should not be interpreted to apply to mortgages and guaranties thereof executed prior to its passage and that, if so interpreted, it is violative of provisions of the Constitution of the United States."

And further (134 F. Supp. 337, 339):

"* * * An examination of the pleadings in the light of the applicable law, however, has convinced the members of the court that the case is not one for which a three-judge court is appropriate. While a substantial question as to the constitutionality of the statute in question is raised, if it be given retroactive application, the real question is one of statutory interpretation rather than the validity of the statute * * *."

* * * * * * *

"The three-judge court will, accordingly, be dissolved and the case will be heard by Judge Hoffman * * *."

This case was heard on its merits by District Judge Hoffman, and on June 20, 1956 he rendered his opinion (R. 101-121), holding, and we quote (R. 114-115):

"As to projects committed subsequent to the passage of the 1954 Act, there can be no question as to its constitutionality or applicability. But with respect to projects already in operation, this Court has concluded that the Housing Act of 1954 is ineffective as, under the circumstances, it cannot be made retroactive. A careful study of the 1954 Act will illustrate that plaintiff's right to lease for periods of less than thirty (30) days un-

doubtedly existed prior to that date despite the primary intent of Congress."

Judge Hoffman further held (R. 116):

"* * * Even if it could be successfully argued that plaintiff had no vested right to lease an apartment for a period of less than thirty (30) days, the effect of the Housing Act of 1954 undoubtedly attempts to create a new obligation with respect to a past transaction and hence must fail."

The Appellant appealed direct to this court from the order of Judge Hoffman, and this Court remanded the case for consideration by a three-judge court (352 U.S. 977).

The opinion of the three-judge district court (R. 127-130), (142 F. Supp. 341) shows that the three-judge court adopted the opinion of Judge Hoffman as its opinion (R. 128):

"Upon consideration of the entire record, the briefs and argument of counsel, this court is in accord with the opinion of Judge Hoffman and herein incorporates the same by reference."

However, the three-judge court, as the reasoning for its findings, stated as follows (R. 129):

"We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation."

This appeal is from the decision of the three-judge court.

In reference to the constitutionality of Section 513 of the Housing Act of 1954, this Court in construing such section, we are confident, will apply the following rules as laid down in the decisions of this Court:

"As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied. Panama Railroad Co. v. Johnson, 264 U.S. 375, 390." *Crowell* v. *Benson*, 285 U.S. 22, 46.

This Court in reference to ambiguous statutes has held:

"The rule is fundamental that, if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter. Railway Co. v. Arkansas, 235 U.S. 350, 369." *Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U.S. 379, 383.

A careful study of section 513 of the Housing Act of 1954, reveals that it is an ingeniously worded piece of legislation, which at first reading would convey the impression that all of its provisions were to apply to all mortgages insured under the National Housing Act, whether insured prior or subsequent to the effective date of the Housing Act of 1954. A further reading of section 513 (the full text of which is appended hereto for the convenience of the Court; Appendix A, page 86) indicates that the drafters of the Act recognized that any attempt to apply the provisions of Section 513 to mortgages insured prior to its enactment so as to affect the vested rights of mortgagors would be unconstitutional, and that the drafters of the Act limited the Commissioner under the terms thereof to the use of only "appropriate means" (Paragraph "d", Appendix A, page 87) in carrying out the intent of Congress as expressed in the Act. The wording of the Act contains no command that the Commissioner shall apply the prohibitive provisions of Paragraphs (f), (g) and (h) of section 513 against projects the mortgages on which were insured prior to the effective date of the Housing Act of 1954.

REVIEW OF SECTION 513 OF THE HOUSING ACT OF 1954

We invite the Court's attention to some very significant facts concerning Section 513 of the Housing Act of 1954.

First: The enacting clause at the beginning of the Housing Act of 1954 states "that this act may be cited as the 'Housing Act of 1954' ".

Second: Paragraph (a) of section 513 states that it had been the intent of Congress since the enactment of the *National Housing Act* (in 1934) that housing built with the aid of mortgages insured under *that Act* be used *principally for residential use,* and that such intent excludes the use of such housing for transient or hotel purposes.

Third: Paragraph (b) states that no multifamily housing "with respect to which a mortgage is insured *under this Act"* (Housing Act of 1954) shall be operated for transient or hotel purposes. There are two stated exceptions, however, where projects operated for transient or hotel purposes may be insured under the 1954 Act: (1) where the Commissioner had agreed to such operation prior to May 28, 1954, and (2) where the project is located in an area which the Commissioner determines to be a *resort area,* etc.

We submit that the term "this Act" as used in Paragraph (b), specifically refers to the Housing Act of 1954. Mortgages insured under the *1954 Act* would include those for which commitments to insure were issued after its enactment, and also those for which commitments were issued prior to its enactment but which had not yet been insured. Reference is made to the date May 28, 1954—that happens to be the date of the report to the Senate on the Housing Act of 1954 by the Senate Committee on Banking and Currency.

Fourth: Paragraph (c) provides that no mortgage with respect to multifamily housing shall be insured under "this

Act" (*the Housing Act of 1954*) or insured for an additional term unless (1) the mortgagor agrees he will not rent any part of the project for hotel or transient purposes and (2) the Commissioner secures the means to regulate the mortgagor (preferred stock). However, there are two very significant exceptions to this provision: (a) where the commitment to insure was issued prior to the effective date of the 1954 Act, and (b) where the Commissioner had agreed to permit transient rentals or where the project was located in a "resort area." These two exceptions are significant and important because they definitely show that mortgages insured prior to the 1954 Act or projects on which mere commitments to insure were issued prior to the 1954 Act, were specifically excepted from the provisions of section 513 of the Housing Act of 1954 prohibiting "operation for transient or hotel purposes," a positive indication that Congress did not intend that section 513 be applied retroactively to disturb mortgages already insured or for which commitments to insure had already been issued.

Fifth: In Paragraph (d) the term "this Act" is used in two different places. In the first instance the term "this Act" has reference to the National Housing Act as in existence prior to the Housing Act of 1954, for it relates to mortgages insured prior to the enactment of the 1954 Act. In the second instance the term "this Act" has reference to the Housing Act of 1954 for it relates to mortgages insured subsequent to its enactment. Paragraph (d) shows a recognition by Congress that the Commissioner's rights under section 513 would differ depending upon whether the mortgage in question was insured by the Federal Housing Administration *prior to* or *subsequent to* the enactment of the Housing Act of 1954. We submit that this paragraph requires a determination as to what constitutes an "appropriate means at his (the Commissioner's) disposal" to carry out the intent of Congress as expressed in the 1954 Act as

against mortgagors whose mortgages were insured prior to the effective date of the 1954 Act.

We submit that the only appropriate means at the disposal of the Commissioner to enforce the provisions of section 513 dealing with "operation for transient or hotel purposes" in connection with a mortgagor whose mortgage was insured before the enactment of the Housing Act of 1954 would be either through the exercise of such rights as the Commissioner may have had, if any, as preferred stockholder of such corporation, by virtue of charter provisions prohibiting any short-term rentals, or by negotiating with such project owner to obtain a voluntary agreement to prevent such rentals.

It must be remembered, as shown in this Brief and as sustained by the record in this case, it was not until 1952 that the Commissioner promulgated a rule or issued a directive prohibiting transient rentals in section 608 projects. The testimony of the Appellant's witness, W. W. Adickes, shows that not until 1952 did Appellant issue its first instructions requiring prohibitions against transient rentals to be applied in connection with section 608 projects (R. 74). We submit that it would be an appropriate act on the part of the Commissioner if he elected to use the contracts, charter provisions or other instruments that he might have secured in connection with the projects he insured after 1952 against transient rentals to prohibit such rentals.

The Commissioner certainly could appropriately negotiate with any owner of a section 608 project to obtain voluntary agreements against transient rentals. Such appropriate negotiation we submit is shown by the testimony of the Appellant's other witness, Adolphus M. Prothro, Director of the Legal Division of the Federal Housing Administration. When asked what steps had been taken prior to the 1954 Act by the Federal Housing Administration to prohibit hotel operations or transient rentals in

projects insured under section 608, he stated in substance that the owners of such projects, from time to time, would want concessions from the Federal Housing Administration and that the Commissioner would negotiate with the owners who desired the concessions and agree to give the concessions if the owners would agree to forego transient rentals in the projects, the testimony of Mr. Prothro being as follows (R. 93):

> "Q. Tell me again, I am not clear on it, what steps you took—by you, I mean the Federal Housing Administration—before the enactment of the 1954 Act to stop the 608's in existence from accepting transient rentals. A. Usually it would be in the nature of a cease and desist order or a request to refrain from this practice.
> "Q. Would that be a court order? A. No. It would usually be a request on our part to the operator. After all, these people were not dealing——
> "Q. In the event they refused to recognize that request what did you do then? A. First we would use what administrative sanctions we had. We usually had them requesting us for certain things and we would say, 'When you carry out the objectives of the Act as we understand them to be, then we would be more inclined to favor your request'."

"Appropriate means" at the disposal of the Commissioner in connection with mortgages insured after the enactment of the Housing Act of 1954 are set out in detail in paragraphs (f), (g) and (h) of section 513.

Sixth: Paragraph (e) of the Act simply defines the terms "rental for transient or hotel purposes" and "multifamily housing."

Seventh: Paragraphs (f), (g) and (h) of the Act outline in detail the procedures to be used by the Commissioner in

reference to projects insured *after* the effective date of the 1954 Act, which are found to be operating in violation of the terms of the said Act.

Eighth: Paragraph (i) of said Act in substance provides that a hotel owner may bring an action in the district court to prohibit transient rentals in an FHA insured project if such rentals are in violation of section 513 of the Act. However, the authority of such hotel owner to bring such action against the 608 projects is limited, we submit, to only such projects as could affect the income of such hotels. This, we believe, is shown by the fact that hotel owners beyond a radius of fifty miles from a section 608 project could not bring such action even if the whole building were being operated completely as a hotel catering exclusively to transient guests. We assert that paragraph (i) shows that the real purpose of section 513 of the Housing Act of 1954 was to protect the profit of hotels—not to protect the rights of the public at large.

Ninth: Paragraph (j) simply gives the district courts jurisdiction of actions brought under section 513.

The Act speaks for itself, but we repeat—nowhere in the Act can there be found any provision or any wording that could be made use of to prohibit the rental of some of the apartments in a project, the mortgage on which was insured prior to the effective date of the Housing Act of 1954, for less than thirty days.

IV. Section 513 of the Housing Act of 1954 was enacted for the private benefit of members of the American Hotel Association. This is not a valid public purpose

The Court below, although it rested its opinion on other grounds, intimated that if necessary it would have found section 513 void on the ground here argued. It said (R. 116):

"• • • Even if it could be successfully argued that plaintiff had no vested right to lease an apartment for a period of less than thirty (30) days, the effect of the Housing Act of 1954 undoubtedly attempts to create a new obligation with respect to a past transaction and hence must fail. 16 C.J.S., 'Constitutional Law', Sec. 417, p. 861. To open an avenue for retroactive or retrospective laws in the field of contract not dealing with police, war, or emergent powers, would have a very serious effect in the commercial world which has become so involved with government financing and other related subjects. In substance, there must be a stopping point somewhere, and this appears to illustrate the dangers involved where Congress has yielded to the requests of a third party with knowledge that there will be a financial loss to the mortgagor and, to a limited extent, the taxpayers."

This Court has recently held:

"When it appears that an Act of Congress conflicts with one of these provisions [Constitution], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation". *Trop* v. *Dulles*, 356 U.S. 86, 104.

We have demonstrated above that Appellee is not operating its apartment building for hotel or transient purposes; that its transient rentals, which never interfere with long term rentals, require only about 10% of its apartments and that such rentals are incidental to its primary and principal business of operating a rental housing project. Such rentals were not only plainly permissible under the applicable statutes and the applicable rules and regulations thereunder,

but are equally plainly within the fair intendment of Appellee's charter. Since Section 513(a) of the Housing Act of 1954 does no more than declare a congressional intent excluding use of projects insured under the National Housing Act "for transient or hotel purposes" and Section 513(b) does not purport to do more than prohibit operation "for transient or hotel purposes", it would seem almost too obvious for argument that the transient rentals of Appellee disclosed by this record and permitted by the court below are not within the prohibitions of Section 513(b) of the Housing Act of 1954, and that the judgment of the court below, permitting Appellee to rent a reasonable number of its apartment units transiently, is plainly right. Since, however, the whole basis of Appellant's argument is the mistaken assumption that Section 513 applies to these transient rentals by Appellee which, as shown, are negligible in number and proportion and are vital to Appellee's solvency, and since a judgment which is right should be affirmed, we shall now proceed to show that even if section 513 of the Housing Act of 1954 were applicable, it could not be enforced against Appellee because not enacted for a public purpose. In so doing, we shall show not only that section 513 was enacted at the insistence of and for the benefit of the American Hotel Association, but also that it operates to provide special privileges for the private benefit of project operators in the State of Florida.

A. Congress Can Act Only in Furtherance of Some Valid Public Purpose

We start from these premises:

1. Congress may legislate only with respect to those powers which the Constitution confers upon the Federal Government either in express terms or by necessary impli-

cation. *Constitution*, Article I, Section 8. This Court has declared:

> "The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. * * *" *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291.

2. Congress may not act arbitrarily, the Due Process clause of the Fifth Amendment being a restraint similar to that imposed on state legislatures by the Equal Protection clause of the Fourteenth Amendment. *Constitution*, Amendments V, XIV; *Perez* v. *Brownell*, 356 U.S. 44; *Bolling* v. *Sharpe*, 347 U.S. 497. As this Court said in *Perez* v. *Brownell* (356 U.S. 44, 58):

> "Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution."

3. The "General Welfare" provision of the first clause of Article I, Section 8 of the Constitution does not empower Congress to legislate substantively for the "general welfare" but merely to appropriate money for the general welfare. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291-292, supra; *United States* v. *Butler*, 297 U.S. 1, 64.

This proposition is forcefully set forth in *Carter* v. *Carter Coal Co.* (298 U.S. 238, 291) in this language:

> "The proposition, often advanced and as often discredited, that the power of the federal government

> inherently extends to purposes affecting the Nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court."

From these premises we draw the inescapable conclusion that Congress may not constitutionally legislate except in furtherance of some valid public purpose—or, stated conversely, that an Act which does not serve a valid public purpose is void.

Although the decision in *United States* v. *Butler*, 297 U.S. 1, supra, was by a divided court, the division was not on Constitutional principles, but only on the application of those principles to the legislation then under attack, and the Court was unanimous in its construction of the General Welfare clause (*United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 738). It is therefore appropriate that we quote from the dissent by Mr. Justice Stone, when with his usual felicity of language he phrased our proposition thus (297 U.S. 1, 83):

> "The Constitution requires that public funds be spent for a defined purpose, the promotion of the general welfare."

We reiterate—the general welfare—not the welfare of the members of some particular private commercial association.

This Court has recently declared that even a Congressional investigation must be for a public purpose. In the recent case of *Watkins* v. *United States*, 354 U.S. 178, involving the refusal of a witness before a committee of Congress to answer certain questions, the Court stated:

"The petitioner has earnestly suggested that the difficult questions of protecting these rights [Constitutional] from infringement by legislative inquiries can be surmounted in this case because there was no public purpose served in his interrogation." (354 U.S. 178, 199.)

This Court held:

"No inquiry is an end in itself; it must be related to, and in furtherance of a legitimate task of Congress." (p. 187)

"While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law making. It is justified solely as an adjunct to the legislative process." (p. 197)

"* * * an investigation into individual affairs is invalid if unrelated to any legislative purpose." (p. 198)

"Their [the committee members'] motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." (p. 200)

"No doubt every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our government but such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms." (p. 204)

It seems clear that "legislative purpose" is synonymous with "public purpose". This is tantamount to a formal declaration that an Act of Congress must serve a valid public purpose.

B. Section 513 of The Housing Act of 1954 Is Special-Interest Legislation, Not Promotive of the General Welfare and Serving No Public Purpose

We turn now to the history and construction of section 513 of the Housing Act of 1954.

1. *Section 513 was enacted at the insistence of the American Hotel Association, for the specific purpose of protecting the profits of the members of that association, and in substantially the same form as the draft prepared by the association.*

In the spring of 1954, representatives[4] of the American Hotel Association appeared before the appropriate Committees of both Houses of Congress to urge the enactment of legislation that would protect the profits of the members of their association. The testimony of these representatives discloses not only that they were actuated solely by selfish motives, but also that they tried to give the false impression that Veterans Emergency Housing projects had been constructed with appropriated funds. In truth, of course, they were financed and constructed exclusively with private capital and no public funds used.[5]

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[4] Mr. Earl M. Johnson, Treasurer of the American Hotel Association, testified before the House Committee (Hearing before the Committee on Banking and Currency, House of Representatives, 83d Cong., 2d Sess., on H.R. 7839, pp. 507-515), and Mr. Arthur J. Packard, Chairman of the Board of the American Hotel Association, testified before the Senate Committee. Mr. Packard's testimony is reproduced in the record (Senate Hearings, Part 1, pp. 654-661; Pl. Ex. 27; R. 44, 195-206). Mr. Johnson's testimony is to the same effect and often in identical language. The testimony of Mr. Johnson and Mr. Packard is compelling that they were not interested in the general welfare—they were interested in the special welfare of the members of their association and in the enhanced profits they expected to result from stifling competition.

[5] See Senator Sparkman's reminder that the Veterans Emergency Housing Program "• • • provided the housing at a time when no other device could have succeeded, and which did it without using 1 cent of Government money." (100 Cong. Rec. 11,883; Pl. Ex. 30; R. 44, 225).

That these projects were government-induced and government-promoted is unquestionably true, but it is a serious abuse of language to characterize them as "government-assisted" or "government-financed". As Congressman Spence stated on the floor of the House on August 25, 1949 in reference to the Veterans Emergency Housing Program (95 Cong. Rec. 12, 287):

> "Mr. Speaker, this is not a gratuity we are giving to those who are insured. Loans are insured as the result of the payment of a premium of one-half of one per cent. That premium has not only been enough to pay the liabilities but has been enough to amass a reserve of $50,000,000 in the last year."

The Federal Housing Administration's twenty-third annual report, for the year ending December 31, 1956 (the latest available to Appellee) speaks for itself. The War Housing Insurance Fund (under which Appellee's mortgage was insured) is discussed on page 126 of that report in these words:

> "During the fiscal year 1956 the fund earned $27,369,485 and had expenses and losses of $16,433,934, leaving $10,935,551 net income before adjustment of valuation reserves. After the valuation reserves had been increased by $4,471,032, the net income for the year amounted to $6,464,519, which was credited to the insurance reserve fund.
>
> "Cumulative income of the War Housing Insurance Fund from its establishment March 28, 1941, to June 30, 1956, amounted to $229,559,367, while cumulative expenses were $98,492,367, leaving $201,067,403 net income before adjustment of reserves. Valuation reserves of $66,489,673 were established, leaving cumulative net income of $134,577,730."

Furthermore, since this is not a mutual fund (op. cit., p. 125), all these profits inure to the Treasury of the United States.[6] Appellee's initial investment of well over $300,000 (R. 103) (which is exclusive of buildings valued at some $70,000 which were torn down to make room for it, R. 3) plus payments to principal of over $80,000 (R, 5) is certainly a substantial investment and just as much the private personal risk capital of Appellee's stockholders as the investment of any hotel owner would ever be.

At this point we invite attention to the unusual provisions of section 513 (i) of the Housing Act of 1954[7], which provides in substance for private enforcement by hotel owners and operators and hotel groups and associations. Such right of enforcement is, however, specifically conditioned upon the complaining hotel being located within a 50-mile radius of an FHA-insured project which is being operated "for hotel or transient purposes."

Motels, like hotels, are conventionally financed. Their business, like hotels, is rental to transients. Yet motel operators are denied the privilege afforded by section 513 (i). Why this curious discrimination in the Act? Do hotels have greater Constitutional rights than motels? That section 513 does not and was never intended to serve any public purpose is highlighted by this subsection (i).

We believe the complete lack of any public purpose in section 513 can be illustrated by reversing the issues in this case. Suppose the Association of Section 608 Owners should appear before the Committees of Congress asking legislation to prohibit hotels from accepting relatively permanent guests (i.e., rental to the same person for more than thirty days at a time), on the ground that such accept-

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[6] Appellee had contributed insurance premiums of $21,598.78 when this action was commenced, March 10, 1955 (R. 5).

[7] The full text of section 513(i) is set forth in Appendix A hereto, p. 89.

ance of relatively permanent guests constituted unfair competition. Would an act passed in response to such request serve any public purpose? Would such an act comply with the Due Process clause? We believe that by asking the question, we have answered it.

2. *Section 513 arbitrarily and unreasonably discriminates against Appellee.*

Section 513 (a) contains a statement of congressional intent; section 513 (c) relates solely to mortgages insured on or after the effective date of the Housing Act of 1954; section 513 (d) directs the Commissioner to enforce the section; section 513 (e) defines "rental for transient or hotel purposes" and "multifamily housing"; sections 513 (f), (g) and (h) authorize litigation by the Commissioner; section 513 (i) was discussed above; and section 513 (j) confers jurisdiction on the district courts. Only section 513 (b), however, purports to prohibit "operation for transient or hotel purposes" in existing housing, and even section 513 (b) does not purport to apply to projects insured prior to its enactment. It reads as follows:

> "(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that

prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis)."

We shall now proceed to analyze the two exemptions in this section and to demonstrate that their effect is so arbitrary, unreasonable and discriminatory as to preclude the enforcement of section 513(b) against Appellee, even if Appellee's project were subject to the terms of that section and even if Appellee's incidental transient rentals of less than ten percent of its apartment units constituted "operation for transient or hotel purposes".

Prior to March 28, 1954, approvals for transient rentals were given when:

> "* * * it appeared to be in the public interest, in the interest of the Government's financial interests, and in the interest of the community in which the structure existed in which there was no demand for apartment rentals * * *". (Testimony of Appellant's witness, Adolphus M. Prothro, R. 92.)

The quoted language could not more perfectly describe Appellee's situation had it been fashioned expressly for that purpose. But the result of the first exemption in section 513(b) is an arbitrary and unreasonable discrimination between Appellee, on the one hand, and on the other hand, those other mortgagor corporations in like situation with Appellee, but which had unnecessarily secured the Federal Housing Administration's paternalistic blessing of their transient rentals prior to the 1954 Act.

But this discrimination favoring projects which had secured an approval they did not need, objectionable as

it is, is less gross than that imposed by the resort area exemption. We know from the debates in Congress that this exempts the whole State of Florida (Colloquy between Senator Smathers and Senator Capehart, July 28, 1954, 100 Cong. Rec. 11,883, supra p. 50), and no regulations defining "resort area" so as to include any place outside Florida have been codified in the current pocket part to the 1949 edition of Title 24 of the Code of Federal Regulations. We must therefore conclude that "resort area" means the whole State of Florida and nowhere else.

The resort area exemption, unlike the first exemption, does not even require that the project have secured approval from the Federal Housing Administration prior to May 28, 1954 to come within it. All that is necessary is that the project be somewhere in Florida and have rented transiently prior to March 28, 1954. If prior to that magic date (over two months before section 513 was enacted), the project had rented every single one of its units transiently to the exclusion of priority tenants, as called for by section 608, it may continue so to do. Quite aside from any considerations of whether the Charleston area could qualify as a "resort area" under appropriate regulations, we are wholly unable to perceive the justice, the logic, or the legal basis for denying to Appellee the right to continue to rent transiently those few apartment units which mean the difference between solvency and bankruptcy, simply because Charleston is not located in Florida.

We venture to suggest that never before or since has Congress enacted legislation which has one effect in one state, and a precisely opposite effect in all the rest. This is indeed that "gross discrimination" which is "equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585.

This is not a case where the infirmity can be cured by striking the offending provision and leaving the rest complete. First, the Act contains no severability clause. *Lynch* v. *United States*, 292 U.S. 571, 586-587; *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241. Second, and even more important, if the exceptions are stricken from section 513(b), what is left is not what Congress wrote nor what Congress intended. This Court will not so rewrite a statute. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 361-362:

> "* * * The statute contains a section broadly declaring the intent that invalid provisions shall not operate to destroy the law as a whole. Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command. Dorchy v. Kansas, 264 U.S. 286. It has the effect of reversing the presumption which would otherwise be indulged, of an intent that, unless the act operates as an entirety, it shall be wholly ineffective. Williams v. Standard Oil Co., 278 U.S. 235, 242; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184. But, notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.* * *"

Conclusion

In conclusion we respectfully submit:

1. That the language of Section 513 of the Housing Act of 1954 specifically excludes Appellee's project;

2. That the prohibitions of Section 513 against "operation for hotel or transient purposes" do not apply to Appellee's incidental rentals for less than thirty days, which rentals are necessary to Appellee's solvency;

3. That retroactive application of Section 513 against Appellee would divest Appellee of its rights without due process of law;

4. That Section 513 is wholly void because enacted for a private not a public purpose; and

5. The judgment of the Court below holding that Appellee

> "has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided that any veteran of World War II, his immediate family, or any other proper person desiring occupancy for a period of thirty days or more is not thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered,"

is plainly right and should be affirmed.

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APPENDIX A

The pertinent parts of the Housing Act of 1954, Public Law 560, 83d Congress, Chapter 649, 2d Session, H.R. 7839, 12 U.S.C.A. Section 1731b reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'Housing Act of 1954.'

"Sec. 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

"(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multi-family housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

"(c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) no mortgage with respect to multifamily housing shall be insured for an additional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes, and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

"(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section 513 by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

"(e) As used in this section, (1) the term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for

any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term 'multifamily housing' shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corporation or trust of the character described in paragraph numbered (1) of subsection (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3)(B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (d) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

"(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court

of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits

the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

(2070-1)